SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 10 1965
JOHN F. DAVIS, CLERK

No. 733

In the

Supreme Court of the United States

OCTOBER TERM, 1965.

IN THE MATTER OF THE PETITION OF H. LESLIE ATLASS FOR EXONERATION FROM OR LIMITATION OF LIABILITY AS THE OWNER OF A CERTAIN VESSEL KNOWN AS THE YACHT SIS.

MOLLIE DARR, Administratrix of the Estate of KURT DARR, Deceased,

Petitioner,

vs.

HARRIET M. ATLASS AND CHICAGO TITLE AND TRUST COMPANY, Executors of the Will of H. LESLIE ATLASS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Mollie Darr, Administratrix of the Estate of Kurt Darr, Deceased, prays that a Writ of Certiorari issue to the United States Court of Appeals for the Seventh Circuit to review the judgment of that court

in reversing the trial judge's findings of fact and conclusions of law and ordering the trial judge to enter an order completely exonerating the original petitioner-owner-employer and operator of the vessel involved from all liability in an occurrence wherein two seamen employees of said employer vessel owner lost their lives by drowning while in his employ on October 26, 1956, at Detroit, Michigan, an intermediary port.

A.

Reference to Reports of Opinions:

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in full in Appendix 1A. The findings of fact and the conclusions of law of the trial court are reported in full in Appendix 1B.

(Appendix 1A is reported as 350 F.2d 592.)

B.

STATEMENT OF JURISDICTIONAL GROUNDS.

The decision of the Court of Appeals for the Seventh Circuit was rendered on June 30, 1965. On July 9, 1965, said Court (CA-7) extended the time for filing a petition for rehearing to July 30, 1965, which was timely filed, and subsequently denied on September 28, 1965, by said Court. Jurisdiction of this Court is invoked pursuant to Title 28 U. S. C. Sec. 1254 (1).

C.

QUESTIONS PRESENTED FOR REVIEW.

1. Does voluntary intoxication on the part of a seaman bar his recovery for damages under the Jones Act (46 USCA 688), as a matter of law, in the event of his injury or death?

(a) Is the known propensity of seamen for partaking of alcoholic beverages during shore leave, while at an in-

termediate port, the type of wilful misconduct which exonerates their employer from the otherwise non-delegable duty of providing the crew with safe means of ingress and egress to and from the vessel at night where the crew is quartered?

2. Can a seaman be guilty of contributory negligence or gross misconduct as a matter of law to preclude recovery under the Jones Act (46 USCA 688) or the General Maritime Law, for attempting to rescue a helplessly, intoxicated fellow seaman who, while returning to his vessel by the usual route, and when alongside said vessel, had fallen through a 32 inch gap of water existing between the dock and marine rail, where their vessel was temporarily located?

D.

STATUTES AND REGULATIONS INVOLVED.

46 U.S.C. Sec. 183-187 (Limitation of Liability Act)

46 U.S.C. 688 (Jones Act)

45 U.S.C. Sec. 51-60 (Federal Employee's Liability Act—incorporated by reference in Jones Act)

46 CFR Sec. 25.25-15 (a)

(The pertinent text of the above is set forth in Appendix 1C.)

E.

STATEMENT OF THE CASE.

The pleasure yacht "Sis", while on a voyage on or about October 20, 1956, from Chicago to Florida, ran aground in the St. Clair River opposite Detroit, Michigan. The yacht's owner and operator, H. Leslie Atlass, who was also her registered master, was aboard at said time.

(*Italics throughout ours.*)

The decedents, Kurt Darr and Clem Muth, were also aboard at that time in the capacity of seamen crew members.

After the yacht was freed from its strand, it proceeded under its own power to the Detroit Yacht Basin, Inc. adjoining the Detroit River in Detroit, Michigan, at the owner's direction to be examined for damage, if any.

To expedite the examination of the yacht's hull, she was temporarily placed on a marine rail adjacent to a wood dock with an existing 32 inch gap of open water between the marine rail and dock as well as a 2 inch level variance between said fixtures.

The area in question was also cluttered with scaffolding, hoses, planks, tools, ropes and debris, not uncommon for a ship yard. There was no outdoor lighting designed for or provided in this immediate area. There was no gangplank, gangway or abridgement provided by the owner, employer or anyone else abridging the 32 inch gap of water to provide a safe ingress or egress to and from the yacht for its crew.

While the yacht was on the marine rail, there were no toilet, bathing or cooking facilities and the crew had to seek these necessities elsewhere. Detroit being an intermediate port, the crew remained quartered on the yacht.

H. Leslie Atlass, owner, operator and master of the yacht "Sis" was present on the marine rail platform and dock area off and on for a period of two days and saw the conditions as they existed both in the daytime and at nighttime.

Atlass departed Detroit on the afternoon of October 24, 1956, and ordered the crew to remain intact and placed

it under the charge of Frank E. Johnson, his duly authorized agent, who was quartered separate and apart from the crew at a local hotel.

One of Johnson's functions as the employer-owner's agent in charge, was to take the crew to a land based restaurant for meals, and on October 25, 1956, at approximately dusk and at the employer/owner's expense, Johnson took the crew members for their evening meal to a local shore based restaurant. After the meal, Johnson, Muth, Darr and McKissick, (the yacht's cook), attended a movie, which concluded shortly before midnight. Said group then proceeded to Garvin's Bar where they met the yacht's chief engineer, Robert Smith.

While at Garvin's Bar, Johnson bought the said crew members unknown rounds of drinks and the crew members also purchased a round or so of drinks.

McKissick left before the others, who remained until about 2:00 a.m. (closing time) which was now October 26, 1956. One member of this group, Clem Muth, apparently became helplessly intoxicated, and it became necessary for Smith and Darr to take Muth to the dock area which was a few blocks away. Upon arrival at the dock area, Darr was the only one assisting Muth to stay on his feet when Muth fell into the 32 inch gap of water (dock 7 feet above water—15 feet deep) which existed between the dock and marine rail.

Darr immediately entered the water to save Muth because Smith was unable to swim and failed to give any appreciable or effective help from the dock. There was no life saving or resuscitation equipment on the dock or readily accessible on the yacht.

Muth became hysterical upon entering the water and flayed away wildly, fighting off all the rescue efforts that

Darr was attempting in the ice cold October water. Even though two other crew members arrived after valuable minutes had uselessly gone by, their rescue efforts were of no avail and resulted in the drowning of both Muth and Darr. Actually, no effort was ever made to rescue Darr. Darr left surviving him, his widow and 3 minor children.

F.

THE RAISING OF THE FEDERAL QUESTIONS.

This petition is to review an order issued by the United States Court of Appeals for the Seventh Circuit, reversing the trial court.

G.

PROCEEDING IN FEDERAL COURTS.

The Petition for Limitation of Liability was commenced in the United States District Court for the Northern District of Illinois, on April 22, 1957. Claim of Mollie Darr, Administratrix of the Estate of Kurt Darr, deceased, filed May 23, 1957. Answer of Mollie Darr, Administratrix, filed May 27, 1957.

Claim of Catherine Eleanor Muth, Administratrix of the Estate of Clem Muth, deceased, filed May 28, 1957. Answer of Catherine Eleanor Muth, Administratrix, filed May 28, 1957.

Jones Act case on behalf of Catherine Eleanor Muth, Administratrix of the Estate of Clem Muth, deceased, was filed March 22, 1957.

Jones Act case on behalf of Mollie Darr, Administratrix of the Estate of Kurt Darr, deceased, was filed on October 23, 1959.

Atlass died after filing his limitation and/or exoneration from liability petition and thereafter his personal representatives were substituted.

The above causes were consolidated and heard in admiralty without a jury as the trial judge refused claimants a jury trial.

Trial of the proceedings was had on December 3, 4, 5, 6, 9, 11, 12, 1963, and May 11, 14, 15, 18, and 19, 1964, before the Honorable Hubert L. Will, Judge of the United States District Court for the Northern District of Illinois, without a jury.

Findings of fact and conclusions of law were entered on June 12, 1964. Judgment order was entered on June 25, 1964.

In brief, pertinent to this Petition, the trial court made the following findings of fact, conclusions of law and entered judgment accordingly as follows:

1. That the yacht "Sis" was a licensed pleasure yacht.

2. That Darr and Muth were seamen crew members aboard the yacht "Sis."

3. That the vessel was in navigation.

4. That the debris and other obstacles on the walkway, dock and marine rail and hazards created by the gap, and difference of levels made the lighting at the time of the drownings insufficient.

5. That ingress to and egress from the yacht on the marine rail could be accomplished only by means of a ladder between the rail bed and the gangway on the starboard side, slightly forward of amidships.

6. That access to and from the yacht was hazardous, especially at night time.

7. That Muth and Darr were partly responsible for their own deaths. Muth's negligence was a 50% factor and Darr's negligence was a 30% factor.

8. That the value of the vessel was $50,000.00 and that limitation of liability should be applied.

9. That the proven damages on behalf of Clem Muth was $142,054.98 which was reduced 50% on account of contributory negligence, less $12,500.00 received on a covenant not to sue from Columbia Broadcasting System, Inc. That the net judgment to the personal representative of Muth was for 36.84426% of $50,000.00 or $18,422.13.

10. That the proven damages on behalf of Kurt Darr was $161,176.51. This was reduced 30% on account of contributory negligence, less $12,500.00 received on a covenant not to sue from Columbia Broadcasting System, Inc. That the net judgment to the personal representative of Kurt Darr was 63.15574% of $50,000.00 or $31,577.87.

Notice of Appeal was filed on September 18, 1964, by claimant Darr. Original Petitioners' representatives filed a cross-appeal on September 21, 1964. The Court of Appeals (CA-7) rendered its decision on June 30, 1965, and claimant Darr thereafter filed a timely petition for a rehearing which was denied by said Court on September 28, 1965.

This Court granted a Writ of Certiorari on a collateral issue of this case, and the Court's opinion is fully reported in *Miner et al v. Atlass,* 363 U.S. 641.

The Court of Appeals (CA-7) substantially reversed the findings of fact of the trial court, completely reversed the judgment of the trial court, and remanded with directions for the trial judge to enter a judgment completely exonerating the substituted representatives of the original Petitioner, H. Leslie Atlass, former owner, master and operator of the pleasure yacht "Sis", from all personal liability.

In brief, pertinent to this petition, the court below (CA-7) concluded as follows:

1. That Darr was not a seaman at the time of his attempted return to his quarters or when he attempted to rescue Muth, who fell in, while alongside the vessel of his employ.

2. That the petitioner was not negligent because neither he nor his agent had notice of any existing dangerous conditions.

3. That Darr was staggering drunk, and as such was guilty of gross misconduct that decisively overruled his personal representative's claim for damages; that he was totally responsible for his drowning.

4. That the lighting conditions were good in the area at the time where the drownings took place.

5. That Petitioner was entitled to exoneration and not merely limitation of his liability.

6. That Atlass could not be negligent even though his agent in charge of the vessel was with the decedents in a tavern buying them drinks and drinking with them immediately prior to the drownings.

7. That Atlass was not negligent because of the condition of the dock and marine rail and the lack of proper ingress and egress to and from the yacht "Sis".

8. That there was no duty on the part of the owner-employer Atlass, to provide his crew with a gangplank and that any member of the crew could have improvised his own gangplank if he so desired.

9. That there were two ways of ingress and egress and that the decedents failed to use a safe route because they took the route normally used by the crew as provided for them by the owner and their employer, Atlass.

H.

REASONS FOR GRANTING WRIT OF CERTIORARI.

The Jones Act (46 USCA 688) has always been considered as *remedial legislation,* such legislation was intended to be *liberally* construed; *Cox* v. *Roth,* 348 U.S. 207 (1955), and not, as would the court below (CA-7) "* * * frustrate the congressional purpose and protection of seamen who are peculiarly the wards of admiralty." (348 U.S., at 210).

"The *Jones Act* as *welfare legislation* is entitled to a *liberal construction* to accomplish its *beneficient* purposes." (348 U.S., at 209-210)

To allow the decision of the court below (CA-7) to remain in its present form would only give the judiciary a license to further erode the Jones Act and thus destroy the congressional purpose and intention for passing said Act.

The court below (CA-7) concluded that seaman Darr's dependent survivors were precluded from recovering damages because his intoxication as a matter of law, was such contributory negligence that in effect completely wiped out the *employer's negligence* contrary to this Court's previous ruling in *Socony Vacuum Oil Co.* v. *Smith* (305 U.S. 424, 59 S Ct. 262) wherein it was held that contributory negligence was no defense to liability in Jones Act and admiralty cases, merely an element to be considered in *mitigation* of *damages.*

The court below (CA-7) in assuming the role of a *Nisi Prius* Court ignored the standards for review in reversing the District Court (sitting in admiralty without a jury) because it failed to show that the findings of the District Court were *clearly erroneous* as set forth by this Court in *McAllister* v. *U.S.* (348 U.S. 19, 75 Sup Ct. 447).

The decision, which is the subject of the Petition for Writ of Certiorari, involves the following conflicts, interpretations and rulings:

1. This decision conflicts with other decisions of other courts of appeal in regard to the same legal doctrines.

A. This decision conflicts with the following decisions which hold that voluntary intoxication does not bar recovery as a matter of law under the General Maritime Law or the Jones Act:

McDonough v. Buckeye SS Co., 200 F 2d 588 (CA 6, 1952) Cert Denied 345 US 926.
Olson, as Admx. v. *New York Central*, 341 F 2d 233 (CA 2nd, 1965).

B. The court below decided a federal question which conflicts with the opinions in the following cases which hold that an employer of seamen owes a non-delegable duty of providing his employees with:

1) a safe place of employment.

2) a safe area for shelter.

3) a safe means of ingress and egress to and from the vessel of employ.

4) safe appliances for work purposes.

Butler v. Whiteman, 356 U. S. 271.
Mahnich v. Southern S.S. Co., 321 U.S. 96.
Schulz v. Penn. R.R. Co., 350 U.S. 523.
C & O Railway Co. v. Newman, 243 F 2d 804.
Carney v. Pittsburgh & Lake Erie RR, 316 F 2d 277.
Marceau v. Great Lakes Transit Corp., 146 F 2d 416.

Sanford v. Caswell, 200 F 2d 830.
Johnson v. Griffith SS Co., 150 F 2d 224.
Lawlor v. Socony Vacuum Oil Co., et al, 275 F 2d 599.

C. This decision conflicts with the following decisions holding that the employer of a decedent seaman is liable for failing to provide and make accessible proper rescue and resuscitation equipment or to use all available means to prevent the seaman in question from drowning:

Gardner v. National Bulk Carrier, Inc., 310 F 2d 284.
Harris v. Penn. RR, 50 F 2nd 866.
Kirincich v. Standard Dredging Co., 112 F 2d 163.
Powers v. NY Central RR Co., 251 F 2d 813.
Sadler v. Penn RR Co., 159 F 2d 784.

2. This decision creates nonuniformity in its interpretation of the following federal statute:

41 Stat. 1007, 46 U.S.C.A. Sec. 688 (Jones Act).

The Court below (CA-7), in search of a plausible reason for reversing the trial court, at least partially based its action for lack of a *Supreme Court precedent:* "This perhaps is a pertinent point to make some observation as to the legal effect which the courts have given to the right of a seaman to recover under the Jones Act for maintenance and cure or for damages for injuries sustained, as are sought in the instant case. *We find no Supreme Court case which has directly decided the point in an action for damages."* (Reference to CA-7 #14872-73 page 7 of Appendix 1A).

In conclusion, seaman Darr, while in the prime of his life, a good husband and father of 3 minor children, needlessly lost his life attempting to rescue a helplessly intoxicated crew member who had fallen into the water alongside his employers vessel.

The causative factors linking the seaman's employer to the tragedy were:

1. Lack of safe access to the vessel.
2. Lack of adequate lighting at night time.
3. Lack of gangplank or abridgement from dock to marine rail ladder.
4. No rescue or resuscitation equipment available in the area of tragedy.

It is quite obvious that a drowning man cannot be saved unless someone takes prompt action to try to save him.

Therefore, taking the above factors into consideration, can a seaman be regarded as being guilty of *gross negligence* for attempting the humanitarian act of rescue to save the life of a drowning fellow seaman?

The Court of Appeals (CA-4) in *Harris* v. *Pa. RR*, 50 F 2nd 866 at 868 and 869, quite aptly stated the ships obligation in regard to a drowning seaman:

> "• • • Equally clear is the obligation upon the part of a ship to save the life of a sailor who falls overboard through a misadventure, not uncommon in his dangerous calling. It is absurd to admit the duty to extend aid in the lesser emergency (maintenance and cure for the sick and injured), and to deny it in the greater. In both cases, it is implied in the contract that the ship shall use every reasonable means to save the life of a human being who has no other source of help. The universal custom of the sea

demands as much wherever human life is in danger. The seaman's contract of employment requires it as a matter of right."

CONCLUSION

For the foregoing reasons we urge this Court to issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to the end that the order of that Court may be reviewed.

Respectfully Submitted,

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APPENDIX 1A.

OPINION OF COURT OF APPEALS

June 30, 1965

Before KILEY, SWYGERT and MAJOR, *Circuit Judges.*

MAJOR, *Circuit Judge.* This proceeding in Admiralty was initiated by H. Leslie Atlass as the owner of the yacht "Sis," under the Limitation of Liability Act (46 U.S.C.A. Secs. 183-189) and Rules 51-54 of the Rules of Practice in Admiralty and Maritime Cases, for exoneration from or, in the alternative, limitation of liability under the Jones Act (46 U.S.C.A. Sec. 688), for the death by drowning of two seamen, Clem Muth and Kurt Darr. Their representatives appeared as claimants and answered the petition. Subsequently, petitioner died and the executors of his estate were substituted as parties. (In this opinion we shall use the term "petitioner" rather than the names of his substituted parties.)

The District Court, after a lengthy trial without a jury, made extensive findings of fact and entered its conclusions of law. It concluded among other things that Atlass as an employer was liable for the deaths of the two seaman-employees which allegedly were proximately caused by the employer's failure to provide a safe means of ingress to and egress from the vessel. The Court also concluded that Muth and Darr were in part responsible for their deaths by reason of their own negligence. The Court, therefore, in summary held that petitioner was not entitled to exoneration but to a limitation of liability. In other words, it concluded there was negligence on the part of Atlass and contributory negligence on the part of Muth and Darr. Based on these conclusions an award of damages was made to the representative of each of claimants' estates.

From the Court's conclusion, embodied in its judgment, that petitioner was entitled to a limitation of liability, claimants appeal. From its conclusion, also embodied

in its judgment, denying exoneration to petitioner, the latter cross-appeals.

While perhaps evident, we think it pertinent to note that if petitioner was entitled to exoneration, the issue as to limitation of liability is of no consequence. As the Court stated in The 84-H, 296 Fed. 427, 431 (C.A. 2):

> "The whole doctrine of limitations of liability presupposes that a liability exists which is to be limited. If no liability exists there is nothing to limit. And in a proceeding to limit liability two duties are imposed upon the court. The first is to ascertain whether any liability exists. If it is found to exist the second duty arises, which is to ascertain whether the loss or damage was occasioned or incurred without the 'privity or knowledge' of the owner of the ship. If no liability is found to exist, the absence of all liability is to be decreed, and there the matter ends."

To the same effect see *Rautbord* v. *Ehmann*, 190 F.2d 533, 537 (C.A. 7).

It appears appropriate in the beginning to make a brief summary of the pleadings. The petition among other things alleged that petitioner was the owner of a certain vessel of the United States known as the yacht "Sis," of the registered dimensions of 101.5 feet in length, 19.2 feet in breadth and 11.1 feet in depth, and of 131 gross and 89 net registered tonnage, with home port at Chicago, Illinois, and that at about 3 a.m. on October 26, 1956, while the "Sis" was within the Admiralty and Maritime jurisdiction of the United States, upon a certain drydock in the harbor at Detroit, Michigan, Clem Muth and Kurt Darr dropped or jumped into open water in a gap between the shipyard dock and the drydock, and drowned, while apparently returning to the yacht after spending the evening and early morning ashore.

The petition alleged that petitioner at all times exercised due diligence to make the vessel seaworthy and

in all respects fit for the uses and purposes for which she was used; that the deaths of the said Muth and Darr were in nowise caused by the fault of the "Sis" or the persons in charge of her, or of petitioner or any other person for whose fault or neglect petitioner might be responsible, but was the direct and immediate result of the fault of Muth and Darr, or the result of inevitable accident. The petition further alleged that Catherine Eleanor Muth as administratrix of the estate of Clem Muth had brought an action in the District Court against petitioner, claiming damages under the Jones Act (46 U.S.C.A. Sec. 688) in the amount of $250,000.00, and that petitioner had reason to believe that the personal representative of Kurt Darr, deceased, would commence an action against petitioner arising out of the same casualty.

The representatives of Muth and Darr (claimants) answered the petition, denying its material allegations. Muth's answer alleged that the death of Clem Muth was the immediate and proximate result of the negligence and careless acts of petitioner, his agents, servants, workmen and employees, occasioned and incurred with the fault, privity and knowledge of petitioner in carelessly permitting certain unsafe and dangerous conditions to prevail, in failing to provide safe and proper equipment on said vessel and in failing to take reasonable precautions to provide safe working conditions. Among the acts of negligence alleged were that petitioner "Negligently failed to provide a reasonably safe place to work, a safe means of ingress to and egress from the vessel, a gangplank or other safe means of leaving or boarding the vessel, adequate and proper illumination or light in the boarding area." (Other acts alleged appear to be embodied in those stated.)

Darr's answer was substantially the same as that of Muth, alleging that his death was caused by the negligence of petitioner, his agents and servants.

We shall first make an abbreviated statement of the facts as found by the District Court. On October 18, 1956, the yacht "Sis" left Belmont Harbor in Chicago, bound for Florida. Among those aboard were H. Leslie

Atlass, vice president of CBS in charge of its Chicago office, the registered owner of the yacht; Muth and Darr; Frank E. Johnson a purchasing agent employed by CBS; Raymond Mendel, acting first mate, employed by Atlass; Robert L. Smith, engineer of the yacht, employed by Atlass, and John Wasilas, a painter employed by CBS.

On October 22, 1956, after having been stranded in the St. Clair River for two days, the yacht proceeded under her own power to the Detroit Basin, Inc., a shipyard in the Detroit River. On October 23, she was there placed on a marine rail and lifted out of the water to facilitate an inspection for damages, if any, resulting from the grounding. The yacht remained on the marine rail until after Muth and Darr drowned.

The marine rail was 101′ long and 34′ wide. Along the north (or inshore) end, it was level with the dock and there was a place 10′ wide to walk onto the marine rail bed without stepping across any gap. The yacht faced north in its position on the marine rail. On the eastern edge of the rail bed there were eight stanchions lined in a north-south row 13′ apart. The base of each stanchion was 15″ wide. Between the second and third, and also between the seventh and eighth, stanchions, from the north, there were steel crosspieces, each an inch in diameter, which crossed at a height of 5½′.

Immediately east of the eastern edge of the rail bed was a 32″ gap, below which there was water. At a point opposite the mid-point between the first and second stanchions (from the north) the water was 10 to 15′ deep. Immediately east of the eastern edge of the rail bed, after the gap, was a walkway about 5′ wide which extended north and south for a distance of 65′. The level of this walkway was approximately 2″ below the rail bed. Preparatory to doing repair work on the yacht, scaffolding was erected by the shipyard company on the starboard side and at her bow. While the yacht was on the marine rail, toilet and cooking facilities on board could not be used. Members of the crew slept on the yacht, although Johnson and Darr occasionally stayed on shore in a hotel.

Two means of ingress and egress were available, (1) a ladder between the rail bed and the gangway on the starboard side slightly forward of midship, which necessitated stepping across the gap, and (2) the north end of the rail bed which abutted the dock where there was no gap (inshore route). Abutting the east edge of the walkway was a boat shed, the west wall of which was 24′ high, all glass except for a 4′ concrete base. Inside the shed there were two north-south rows of ceiling light fixtures, four fixtures to a row.

While the yacht was on the marine rail or before, Atlass (petitioner) was joined by his son, Atlass, Jr., and his daughter, Harriet. On the morning of October 24, Atlass and members of his family left for Chicago, leaving Johnson in charge. Atlass was not again present at the yacht until after the fatal occurrence.

We now come to the events of the night of October 25, which culminated in the fatalities at about 3 o'clock the following morning. At about 7 p.m. (after dark), Smith, Mendel, Johnson, Wasilas, Muth and Darr went ashore to eat. The group left by the route they had most frequently taken, going from the vessel gangway down the ladder on the marine rail platform and then stepping across the gap to the walkway. This was at a point about 50′ from the north end of the walkway where there was an entrance from the boat shed. The party could have used the inshore route that night, where it was not necessary to cross any water. Everyone, including Muth and Darr, had used the inshore route on previous occasions, both in daylight and dark. Mendel returned to the ship at about 8 p.m., and Wasilas at about 9 p.m.

After dinner, Johnson, Muth and Darr went to a movie, then to a tavern known as Garvin's Bar where they found Smith and took turns ordering rounds of drinks. Muth was drinking straight whiskey with beer chasers. The bar stopped serving drinks at 2 a.m., and shortly thereafter Muth, Darr and Smith left, having been in the tavern three hours. A few minutes later they appeared at the boat shed through which they must pass in returning to the yacht.

Gildersleeve, who had been the night watchman for thirteen years, unlocked the shed, turned on the overhead lights and permitted the three men to pass through. Darr was attempting to hold Muth as they went through the door, three or four steps ahead of Smith. As they emerged on the walkway, Darr was holding Muth up. They could have gone straight ahead and reached the rail bed by the inshore route, but instead they turned left and started down the walkway. About 15′ from the door of the boat shed, Muth fell into the gap between the walkway and the marine rail platform. Darr jumped in right behind him. They both drowned. (There was no proof that Muth was attempting to cross the gap at that unusual point.)

While the degree of intoxication of Muth and Darr at the time of the fatal occurrence is highly important, we need not burden this opinion with a detailed recital of the testimony bearing thereon. The Court found:

> "Muth and Darr were, in part, responsible by reason of their own negligence for their deaths. Both had been drinking alcoholic beverages immediately prior to the drowning, Muth having consumed substantially more than Darr. Both men knew or had reason to know of the debris and other obstacles on the walkway, dock and rail bed, and of the gaps, differences in levels and poor lighting. Muth's negligence was a 50% factor in causing his death, while Darr's negligence was a 30% factor in causing his death."

This is a tepid finding insofar as it relates to the degree of their intoxication. The proof discloses beyond question that Muth, when he left the tavern and at the time he fell into the gap, was intoxicated to the extent that he was in a stupor, and Darr was in a staggering condition. Just outside the tavern, while Smith and Darr were attempting to hold Muth up, he fell on the curb and skinned his knees and the side of his head. Their demeanor after they were in the water, as subsequently shown, strongly corroborates the direct proof as to the helpless condition of one and the near-helpless condition of the other.

This perhaps is a pertinent point to make some observations as to the legal effect which the courts have given to the right of a seaman to recover under the Jones Act for maintenance and cure or for damages for injuries sustained, as are sought in the instant case. We find no Supreme Court case which has directly decided the point in an action for damages. However, *Farrell* v. *United States, et al.*, 336 U.S. 511, throws some light on the issue and it is pertinent because it contrasts the rights of the seaman under the two forms of action which are sometimes confused. In that case, the seaman sought to recover on both theories. The trial court sustained his action for maintenance and cure but dismissed it for damages. The Court of Appeals affirmed, *Farrell* v. *United States, et al.*, 167 F. 2d 781. The Supreme Court, in affirming the Court of Appeals, referred to a previous opinion and stated (page 515):

> "In *Aguilar* v. *Standard Oil Co.*, 318 U.S. 724, the Court pointed out that logically and historically the duty of maintenance and cure derives from a seaman's dependence on his ship, not from his individual deserts, and arises from his disability, not from anyone's fault. We there refused to look to the personal nature of the seaman's activity at the moment of injury to determine his right to award. Aside from *gross misconduct* or insubordination, what the seaman is doing and why and how he sustains injury does not affect his right to maintenance and cure, however *decisive it may be as to claims for indemnity or for damages for negligence.* [Italics supplied.]"

Thus, the Court indicates that gross misconduct, and we think the conduct of Muth and Darr must be so characterized, may be decisive in an action for damages based on negligence.

In *Wiper* v. *Erie Sand Steamship Co.*, 293 F. 2d 491, the Court affirmed the dismissal of a Jones Act case brought on the theory that the shipowner was negligent in permitting the seaman to go ashore when he was in a drunken condition. In rejecting the theory, the Court stated (page 493):

"Whatever the 'parental' duty of a ship's captain may be, it surely does not require him to forcibly detain every crew member who has had a few drinks or who wishes to go ashore to do a bit of drinking for relaxation."

In *Schlichter* v. *Port Arthur Towing Company,* 288 F. 2d 801, in a damage action for the death of a seaman by drowning when he fell overboard, the Court sustained a judgment in favor of the vessel owner. The Court cited cases in support of the general rule that intoxication only mitigates damages but (page 803), "Of course, the result is different if the seaman's negligent intoxication is the sole cause of the injuries."

In *Barlow* v. *Pan Atlantic S.S. Corp., et al.,* 101 F. 2d 697, the Court affirmed a judgment denying the right of a seaman to recover maintenance and cure because of injuries sustained as a result of falling from a ladder while intoxicated.

In *The S.S. Berwindglen, Rawding* v. *Hooten,* 88 F. 2d 125, the Court sustained a judgment denying a claim for maintenance and cure for injuries sustained in attempting while intoxicated to climb a ladder leading to the dock.

Another case to be noted because of its similarity of facts is *Landy* v. *United States, et al.,* 101 F. Supp. 486. The action in Admiralty was brought by decedent's representative to recover damages under the Jones Act for a seaman's death occasioned by injuries sustained when he fell from a ladder while attempting to board a vessel. The owner was charged with negligence in failing to provide a safe means of ingress by reason of the defective condition of the ladder. The Court found that the seaman became intoxicated while ashore and returned to the vessel in that condition. Notwithstanding the Court's finding that the ladder was defective as alleged, it dismissed the claim on the basis that the seaman fell solely because he was intoxicated.

Prior to a consideration of the findings which form the basis for the Court's judgment against Atlass, we refer to

an issue of importance, that is, whether Muth and Darr at the time of their deaths were engaged "in the course of their employment," a prerequisite to the right to maintain an action under the Jones Act. The issue is further in the case because of claimants' contention that Johnson and Smith, with knowledge of the intoxicated condition of Muth and Darr, were negligent in permitting them to return to the yacht and that such negligence was imputable to Atlass.

In *Braen* v. *Pfeifer Oil Transportation Co., Inc.,* 361 U.S. 129, 133, the Court stated:

> "Petitioner was acting 'in the course of his employment' at the time of the injury, for at that moment he was doing the work of his employer pursuant to his employer's orders."

Assuming that Muth and Darr were in the course of their employment while departing from the yacht for the purpose of obtaining their meals and returning thereto in the normal manner, it certainly is a far-fetched idea that they continued in such course when they took to themselves the liberty of spending three near-midnight hours in a tavern consuming intoxicating liquors. Neither do we think that such relationship was restored when they attempted to return to the yacht, one in a drunken stupor and the other badly intoxicated.

Claimants attempt to meet this problem with the argument that the intoxicated condition of Muth was evident to Atlass' agents Johnson and Smith; that such agents were negligent in permitting his return to the ship; that they were acting within the scope of their employment in so doing and that such negligence was imputable to Atlass. We think this argument is without merit. Pertinent to this point is the Court's finding:

> "Early in the evening of October 25, 1956, Muth, Darr, Mendel, Smith and Wasilas, among others, were taken to dinner by Johnson. Thereafter, Mendel and Wasilas returned to the yacht. Smith went to a tavern called Garvin's Bar where he was joined later

by Muth and Darr. The three men remained until shortly after 2 a.m., and during this period Muth and Darr consumed alcoholic beverages."

In the first place, there is no finding that Johnson had knowledge of the intoxicated condition of the two men. There is testimony that he went to the tavern with Muth and Darr, where they joined Smith and had some drinks. Later, time not disclosed, Johnson left the party and returned to his hotel. Thus, the most that is shown as to Johnson is that he knew they were in a tavern drinking intoxicating liquors. He did not accompany and had nothing to do with the return of Muth and Darr to the ship. On what theory he could be found negligent is not discernible.

Assuming, without a finding, that Smith was negligent in accompanying and permitting Muth and Darr to return to the ship, such negligence could not be imputable to Atlass because Smith's activities, both affirmative and negative, were not within the scope of his employment. Certainly he was without authority and it was no part of his duties to protect drunk men in returning to the ship or to prevent them from so doing.

Claimants cite only one Federal case, *McDonough* v. *Buckeye S.S. Co.*, 103 F. Supp. 473, affirmed 200 F. 2d 558 (C.A. 6), in support of their theory that Atlass is liable because of the negligence of his agents in taking Muth and Darr to the ship, a place of asserted danger. A comparison of the facts of that case with those here demonstrates that it is of no benefit to claimants. There, the ship owner knew that it was a regular procedure on his ship for a seaman to get drunk ashore and to be brought back to his ship by others of his crew and, with that knowledge, the owner had acquiesced in the practice. In fact, the ship owner employed a guard at the gate who was charged with the duty of refusing admission to seamen returning in an intoxicated condition. The guard placed another employee in charge of the drunken sailor for the purpose of escorting him to the ship. Instead of discharging his responsibility, the other employee, mid-

way on the journey, abandoned the intoxicated sailor, who later was found drowned. The Court under those circumstances properly held, we think, that the ship owner was responsible for the negligence of its employees who were acting under specific directions and thus undoubtedly in the course of their employment.

Any doubt as to the holding in *Buckeye* is dispelled by *Robinson* v. *Northeastern Steamship Corp.*, 228 F. 2d 679 (C.A. 2), in which an action for damages under the Jones Act was dismissed. The Court stated (page 681):

> "There [referring to Buckeye] the shipowner was held liable for the death of a drunken seaman who was drowned, when returning from shore leave, through the negligence of a shipmate who had undertaken to assist him to the vessel. In that case in assisting his shipmate the negligent sailor was acting in accordance with a long-standing custom, which had been recognized and approved by the shipowner, and consequently he was considered as acting within the scope of his employment. In the case at bar there was no proof that Woods' actions were requested or authorized by the defendant or were in accord with a custom recognized by the defendant. Without such authorization Woods was not acting within the scope of his employment, and his negligence, if any, in performing his voluntary undertaking could not be imputed to the defendant even if successful performance would further the interests of the shipowner."

The Second Circuit as late as 1963, in a Jones Act case approved of the decision in *Robinson* and reversed a judgment in favor of the claimant (a seaman). *Trost* v. *American Hawaiian Steamship Co.*, 324 F. 2d 225. As to *Robinson* the Court stated (page 228):

> "Although willing to assume that the assisting seaman was negligent and that the plaintiff's decedent was killed while in the course of *his* employment, this court refused to hold the shipowner responsible. Rather, we held in *Robinson* that the particular act

performed negligently, aiding an intoxicated seaman to return to his ship, was not within the scope of the negligent seaman's employment. [Citing cases.]"

Preliminary to a consideration of the findings relating to petitioner's negligence, it is pertinent to observe that there is no finding of negligence on the part of any person except Muth and Darr. As to Atlass, the Court found:

> "Atlass personally, who was in Chicago, was without responsibility for the hazardous condition of the walkway, dock and rail bed as it existed at the time of the drownings."

Taking this finding at its face value, it would appear to exonerate Atlass from all responsibility for the asserted negligent conditions existing at the time of the occurrence. It may be that the Court while finding that Atlass was not personally responsible thought he was liable because of negligence of others imputable to him. If such be the thinking, there was, as noted, no finding that Johnson, left in charge of the ship when Atlass returned to Chicago, was negligent, and there is no finding that any other employee or agent of Atlass was negligent. It seems that if petitioner is to be held liable on an imputable negligence theory, he is entitled to know by whose negligence and of what it consisted.

In considering the findings as they concern the issue of petitioner's negligence, we recognize, without the citation of authority, two well established principles of law, (1) that an employer has a duty to provide seamen in his employment with safe and seaworthy appliances and a safe place to work, including a safe, adequately lighted means of ingress and egress to and from the vessel, and (2) that the burden of proof under the Jones Act to show negligence causally relating to the accident is on the seaman or his representative. Negligence is not presumed but must be affirmatively proved.

The findings as they relate to negligence, other than those already referred to, are:

"No. 27. Access to the rail bed from shore was hazardous, particularly at night, whether it was accomplished from the walkway, by stepping across the gap, or from the dock where it was flush with the rail. Part of the five foot width of the walkway was obstructed by timbers and planks. The east side of the rail bed was made dangerous by the gap, the difference in its level as compared with that of the dock, and the presence of scaffolding, stanchions and cross bars; in addition, the rail bed was cluttered with ropes and planks. The north side of the rail bed, along part of which there was no gap, also was obstructed by scaffolding and littered with ropes and planks. The route most frequently taken from shore to the rail bed was along the walkway and across the gap."

"No. 39. Considering the debris and other obstacles on the walkway, dock and rail bed, and the hazards created by the gaps and differences of levels, the lighting of the walkway, dock and rail bed at the time of the drowning was insufficient."

As already noted, there is no finding or conclusion by the Court that the condition portrayed by these findings was due to the fault or negligence of Atlass, Johnson or any other employee; in fact, the Court found that Atlass was not personally responsible. The stanchions and crossbars referred to were a part of the permanent rail bed structure. The shipyard company constructed the scaffolding preparatory to doing repair work on the yacht, and it was also responsible for the ropes and planks on the rail bed.

Assuming, absent a finding, that there was negligence on the part of petitioner's employees in permitting these so-called obstructions on the rail bed (west) side of the gap, they could not have contributed in whole or in part to the tragedy because Muth and Darr were on the walkway on the opposite (east) side of the gap when they fell or jumped into the water.

That portion of the findings that the walkway was obstructed by timbers, planks, debris and other obstacles is without substantial support. The only testimony we find in this respect is that there were some planks on the walkway, and the photographs offered by claimants show that they were piled in order in their usual place on the east side of the walkway, against the wall of the boat shed. These planks were a part of the facilities furnished by the shipyard company for use by seamen if needed in bridging the gap between the walkway and the rail bed. They were never used by any of petitioner's seamen, including Muth and Darr, because their use was not thought necessary. In any event, the presence of these planks bore no relation to the occurrence. Muth and Darr made no attempt to return to the ship along the north side of the rail bed where there was no gap. When they left the boat shed accompanied by Smith, they turned left and proceeded south along the walkway, headed for the point across the gap from the ladder. As the Court found, this was the route most frequently taken from shore to the rail bed. There is no proof and no claim that there was any obstacle on the walkway which interfered in any manner with Muth and Darr as they proceeded along the walk on the east side of the gap.

The Court's finding that "the lighting of the walkway, * * * at the time of the drowning was insufficient" is of a conclusory nature, based upon the opinion testimony of claimants' expert witnesses. Petitioner's expert witness expressed his opinion that the illumination on the walk was sufficient for the purpose of its use. These witnesses seemed to be in substantial agreement that the illumination was equal to that furnished to pedestrians on Chicago streets. The proof by witnesses who had personal knowledge of the condition is overwhelming that the illumination was sufficient for normal and ordinary use. No amount of illumination could have saved Muth and Darr from their own folly. That could have been accomplished only by placing a cover over the gap from end to end.

Smith, the only eye witness, testified that the point of the occurrence was about midway between the entrance to the walkway and the ladder, which had been in the same place since the yacht had been on the rail bed. He stated that "the lighting was good enough you could see to get around in out there because it was shining right through the glass on the platform out here and the walkway"; that he had been with Muth and Darr on previous occasions when they were crossing the gap between the walkway and the rail bed, and that they had no difficulty in seeing. Milton Pinkstaff testified that he had been employed by the shipyard as a carpenter for some fourteen years, that the rail bed had remained in the same position during that time and that the gap was easy to step across. He arrived at the scene of the occurrence at about 3 a.m., and stated that there were no hoses, ropes or debris on the walkway, that the lights in the boathouse were on and that the lighting conditions were very good. Morton Gildersleeve testified that he had been employed by the Detroit Basin as a night watchman from 1948 to 1961, that when on duty he stepped across the gap two or three times each night and that during his employment no person other than Muth and Darr had fallen into the gap. He observed no debris of any kind on the walkway and stated that the lighting conditions were good. All members of the crew, including Muth and Darr, in daytime and at night, had stepped over the gap many times in leaving and returning to the yacht. Atlass' daughter testified that with her tight skirt and high heeled shoes it was an easy step. Raymond Mendel, a witness for claimants, testified, "There wasn't too much light that did come through them windows. It was like early evening, just between dark and evening, you know dusk." He admitted that flashlights were available on the yacht but were rarely needed. In a pre-trial statement, the witness said, "That was an easy step and I am sure everybody who was on the yacht and who I have mentioned, including Mr. Atlass' daughter, Sis, who was a girl in her teens, stepped across the gap without any trouble. I know that I saw Muth and Darr go onto the platform in both ways I have described."

The Court made no finding that insufficient lighting of the walkway was due to the negligence of Atlass or any of his employees or that it was the cause, in whole or in part, for the fatal occurence. We think there is no basis for a reasonable inference that it was. The misconduct of claimants' decedents was solely responsible for their unfortunate demise.

In *Jackson* v. *Pittsburgh S. S. Co.*, 131 F.2d 668, the Court affirmed a judgment denying to a seaman a claim for damages under the Jones Act. It was there alleged that the boat owner was negligent in his failure to furnish a ladder or any other means of ingress and egress. The seaman desired to go ashore, jumped from the deck of the vessel to the dock, a distance of about six feet and sustained the injuries complained of. The Court assumed that the owner was negligent in failing to provide a ladder but denied recovery because the misconduct of the seaman was the sole cause of his injuries. In doing so the Court stated (page 670):

> "When a seaman, by his own volition, creates an extraneous circumstance, he brings about an intervening cause that directly affects his relation to his employers and to the ship. He is responsible for such intervening cause if it consists of his own wilful misconduct, is something which is done in pursuance of some private avocation or business, or grows out of relations unconnected with the service or is not the logical incident of duty in the service. [Citing cases.]"

See also *Meintsma* v. *United States*, 164 F.2d 976, 977.

In conclusion, it seems in order to make a brief statement of the undisputed facts relative to the conduct of Muth and Darr after they were in the water. Smith who was unable to swim stepped to the gap, knelt down and directed his flashlight therein. He saw Darr trying to help Muth, but Muth was throwing his arms around and fighting Darr. Smith lay on the walkway with his left hand down into the gap about three or four feet. He braced himself with his right hand on the rail platform. Smith

shouted several times for them to grab hold of his hand, and if either had reached up he could have done so, but neither did. Gildersleeve, the night watchman was at the scene in a few minutes and saw Smith dangling a rope, trying to get Muth to grab it, holding it right in front of Muth's face between his outstretched arms. The rope actually came in contact with Muth's head and body but he did not take hold of it. Gildersleeve placed a ladder in the water but Muth would not take hold.

Mendel and Wasilas were asleep on the boat when they heard cries for help. Both came to the platform and jumped into the water in an effort to save Muth and Darr. At that time the latter had disappeared. They tied a tight line around Muth's body and gave the end of it to Smith. They then swam underneath the dock into the boat shed and climbed out of the water. Smith held Muth out of the water until their return. When they attempted to pull him from the water, he slipped through the loop and was not seen again.

Muth and Darr were middle-aged men, healthy and vigorous, and both were swimmers. The conclusion is inescapable that their total inability to aid themselves or each other after they were in the water was the result of their intoxicated condition, induced by their own voluntary acts. In contrast, Mendel and Wasilas, who were sober, were in the water for some ten minutes and had no difficulty in swimming to safety.

In our judgment, and we so hold, the deaths of Muth and Darr were the result solely of their own gross misconduct. It follows that the Court erred in its refusal to exonerate Atlass of all liability for loss or damage occasioned thereby. In view of this conclusion, other issues discussed in the briefs need not be considered.

The judgment is reversed and the cause remanded for such further proceedings as are not inconsistent with this holding.

wheelhouse and painted the top deck. An additional two coats of paint were to be applied to the hull when the yacht docked in Florida.

11. On the day that the "Sis" was to sail for Florida, Johnson, on Atlass' behalf, told Muth, Darr and Wasilas that extra deck hands were needed for the voyage, and he asked them to come along to work. They agreed to do so.

12. As the trip commenced, Muth, Darr and Wasilas assisted with the folding of the lines. Shortly thereafter, Muth, Darr and Mendel were instructed by Atlass (or, on his behalf, by Johnson) to install a watertight manhole cover near the yacht's bow. They attempted unsuccessfully to do so while the "Sis" was heading into a strong wind and high waves; later the vessel was turned and slowed, and the job was completed.

13. The following afternoon, Muth, Darr, Wasilas and Mendel cleaned, mopped and straightened up the deck.

14. At various times during the voyage, Muth, Darr and Wasilas kept watch. In addition, Darr steered some of the time.

15. On October 20, the yacht stranded in the St. Clair River. Everyone aboard, including Muth and Darr, assisted in efforts to dislodge her. She finally was freed on October 22 and proceeded under her own power to the Detroit Basin, Inc., on the Detroit River.

16. On October 23, the yacht was placed on a marine rail and lifted out of the water to facilitate an inspection for damages, if any, resulting from the grounding. The yacht remained on the marine rail from that time until after Muth and Darr drowned.

17. While she was on the marine rail, ingress to and egress from the yacht could be accomplished only by means of a ladder between the rail bed and the gangway on the starboard side, slightly forward of midships.

18. While the "Sis" was on the marine rail, toilet and cooking facilities on board could not be used. The crew continued, nevertheless, to sleep on board. Muth, Mendel, Smith and Wasilas, among others, slept in the crew's quarters as they had each night after the vessel left Chicago. Johnson, who with Darr had been sleeping in the officers' quarters, stayed in a hotel after October 23; Darr slept in a hotel one of the nights October 23-24 and in the officers' quarters the other night. Atlass, who had slept in the master stateroom, moved to a hotel on October 23 and returned to Chicago on October 24.

19. When Atlas left Detroit on October 24, he told Johnson that he was in charge and that the yacht was to be repaired and readied to continue to Florida. Thereafter, Johnson gave directions and orders and paid for meals eaten by the men.

20. While the yacht was on the marine rail, Muth and Wasilas painted the mess hall and the galley, and Mendel weaved lines and ropes.

21. On the marine rail, the "Sis" faced north. Scaffolding was erected along the yacht's starboard side and at her bow. Near the edge of the rail bed, east of the starboard side scaffolding, there were eight stanchions lined in a north-south row, 13 feet apart. The base of each such stanchion was 15 inches wide. Between the second and third and also between the seventh and eighth stanchions (from the north), there were steel cross pieces, each an inch in diameter, which crossed at a height of five and one-half feet.

22. Immediately east of the eastern edge of the rail bed was a 32 inch gap below which was water. At a point opposite the midpoint between the first and second stanchions (from the north), the water was 10-15 feet deep.

23. Immediately east of the eastern edge of the rail bed, after the gap, was a walkway the northernmost 65 foot length of which was about five feet wide. The level of this walkway was approximately two inches below that of the rail bed.

24. Abutting the east edge of this walkway was a boat shed, 24 feet high. The shed's west wall consisted of a concrete base, four feet high, and panes of glass above the base.

25. Inside the shed there were two north-south rows of ceiling light fixtures, four fixtures to a row. These rows were located 15 feet and 36 feet, respectively, east of the shed's west wall. The northernmost and southernmost fixture in each row was about 16 feet from the north and south ends, respectively, of the shed. Each fixture was 24 feet above the level of the dock, and within each row each fixture was 16 feet from the next. Each fixture housed a 200 watt incandescent bulb with an RLM dome-type reflector.

26. The marine rail bed was 101 feet long and 34 feet wide. Along its north (or inshore) end, for 12 feet west from its northeast edge, there was a 19 inch gap north of which was a dock. This dock abutted the north end of the rail bed without any gap for 10 feet west of that portion of the north edge of the rail bed which was separated by a gap from the dock. Along the entire north edge, the water was 3-4 feet deep.

27. Access to the rail bed from shore was hazardous, particularly at night, whether it was accomplished from the walkway, by stepping across the gap, or from the dock where it was flush with the rail. Part of the five foot width of the walkway was obstructed by timbers and planks. The east side of the rail bed was made dangerous by the gap, the difference in its level as compared with that of the dock, and the presence of scaffolding, stanchions and cross bars; in addition, the rail bed was cluttered with ropes and planks. The north side of the rail bed, along part of which there was no gap, also was obstructed by scaffolding and littered with ropes and planks. The route most frequently taken from shore to the rail bed was along the walkway and across the gap.

28. Early in the evening of October 25, 1956, Muth, Darr, Mendel, Smith and Wasilas, among others, were

taken to dinner by Johnson. Thereafter, Mendel and Wasilas returned to the yacht. Smith went to a tavern called Garvin's Bar where he was joined later by Muth and Darr. The three men remained until shortly after 2 a.m., and during this period Muth and Darr consumed alcoholic beverages.

29. Muth, Darr and Smith left Garvin's Bar together. Muth soon commenced staggering and had to be assisted by the other two. At one point, Muth slipped and fell into the street and had to be aided to his feet.

30. The three proceeded to the Detroit Yacht Basin where the outside door to the boat shed was locked. They rang for the night watchman who came, turned on the overhead lights in the shed and unlocked the door to let them pass through. As they did so, Muth was staggering and Darr, on Muth's left, was assisting him. Smith followed, a few steps behind.

31. The three men turned south down the walkway. Opposite a point between the first and second stanchions, about 15 feet south of the northern terminus of the walkway, Muth fell into the gap between the walkway and the rail bed. Immediately, Darr jumped in to try to save Muth.

32. Wasilas and Mendel, both asleep on the yacht, were awakened by Smith's cries for help. By the time they reached the walkway where Smith, who was unable to swim, was shining a flashlight into the water. Darr had disappeared from sight. Wasilas and Mendel jumped into the water to assist Muth, but they were unable to rescue him.

33. At the time of the drowning, no member of the crew had been discharged either by Atlass or his authorized agent.

34. Muth and Darr had a more-or-less permanent connection with the relevant voyage of the "Sis".

35. The services which Muth and Darr performed on the "Sis" were maritime in character.

36. At the time of the drowning, the "Sis" was a vessel in navigation.

37. Minimum levels of lighting recommended by the Illuminating Engineering Society are the following: general areas of shipyards, 5 foot candles; freight and passenger piers, 20 foot candles; inactive pedestrian and/or conveyor entrances normally locked and infrequently used, 1 foot candle.

38. At the time of the drowning, illumination on the walkway, dock and rail bed was less than one foot candle.

39. Considering the debris and other obstacles on the walkway, dock and rail bed, and the hazards created by the gaps and differences of levels, the lighting of the walkway, dock and rail bed at the time of the drowning was insufficient.

40. Muth and Darr were, in part, responsible by reason of their own negligence for their deaths. Both had been drinking alcoholic beverages immediately prior to the drowning, Muth having consumed substantially more than Darr. Both men knew or had reason to know of the debris and other obstacles on the walkway, dock and rail bed, and of the gaps, differences in levels and poor lighting. Muth's negligence was a 50% factor in causing his death, while Darr's negligence was a 30% factor in causing his death.

41. Atlass personally, who was in Chicago, was without responsibility for the hazardous condition of the walkway, dock and rail bed as it existed at the time of the drownings.

42. On March 15, 1961, the "Sis" was sold by Atlass' estate for $30,000. In 1952, Atlass had asked $85,000 for the yacht. In 1954, he had reduced the price to $75,000, and in 1956, he again offered to sell her for this amount. In 1956, the replacement cost of the "Sis" was more than $100,000. In 1962 and 1963, several qualified marine appraisers retained by the petitioner expressed opinions as

to the fair market value of the "Sis" in 1956 which ranged between $25,000 and $35,000.

43. The fair market value of the "Sis" on October 26, 1956, was $50,000.00.

44. On March 22, 1957, claimant Catherine Muth filed in this Court civil action No. 57 C 528 stating a claim against Atlass under the Jones Act, 46 U.S.C. § 688. On April 22, 1957, the instant proceeding was commenced by Atlass, filing a petition for limitation of or exoneration from liability. On October 23, 1959, claimant Mollie Darr filed civil action No. 59 C 1692 against Atlass and CBS, under the Jones Act. Shortly thereafter, claimant Muth filed civil action No. 59 C 1697 against CBS, under the Jones Act. Atlass died on November 18, 1960, and his executors were substituted as the petitioners in the instant action. Upon the execution of a covenant not to sue, both claimants settled their suits against CBS.

45. On October 26, 1956, Muth and claimant Catherine Muth had a joint life expectancy of 24.63 years; Darr and claimant Mollie Darr had a joint life expectancy of 21.04 years.

46. If they had survived, Muth and Darr both would have retired upon reaching the age of 65. On October 26, 1956, therefore, Muth had a work expectancy of 23 years, 6 months, and Darr had a work expectancy of 18 years, 2 months.

47. Muth and Darr each spent 25% of his income on himself.

48. Claimants Catherine Muth and Mollie Darr each received $12,500.00 from CBS in exchange for a covenant not to sue.

49. Muth and Darr each would have received biennial wage increases of 4% from the expiration of the present contract until the date of their retirement.

Conclusion of Law

1. The Court has jurisdiction over the instant litigation.

2. Muth and Darr were seamen within the meaning of the Jones Act, 46 U.S.C. § 688, at the time of their deaths. See Carumbo v. Cape Cod S. S. C., 123 F. 2d 991 (1st Cir. 1941).

3. From October 18, 1956, when the voyage commenced, to and including the time of the drownings, Muth and Darr were borrowed servants of Atlass', and accordingly he was their "employer" within the meaning of the Jones Act.

4. Under the Jones Act, an employer is liable for injuries to or death of his seamen-employees proximately caused by the employer's failure to provide a safe means of ingress to and egress from the vessel. This duty extends to an area in close proximity with the gangway or gangplank such as the place where Muth and Darr drowned. Cf. Marceau v. Great Lakes Transit Corp., 146 F. 2d 416 (2d Cir.), cert. denied, 324 U.S. 872 (1945).

5. Negligence of seamen-employees which proximately contributes to their injury or death reduces proportionately the amount of damages which may be recovered of the employer.

6. Atlass' liability to claimants Catherine Muth and Mollie Darr is limited to the fair market value of the "Sis" as of the date of the drownings. 46 U.S.C. § 183.

7. In determining present values in this case, a discount factor of 5% should be used. In calculating interest in this case, an interest rate of 5% should be used.

8. The following damages, which must be reduced by 50% (the contribution to Muth's death of his own negligence), have been sustained by claimant Catherine Muth:

a. Muth's lost wages from CBS employment from the date of his death to date, reduced by 25% (which he would have spent on himself), plus

b. the present value of Muth's future lost wages from CBS employment from the present to the date of his retirement, reduced by 25%, plus.

c. the present value as of his death, plus interest to date, of $500.00 per year for 24.63 years as compensation for services performed around the house and for parental guidance, plus

d. the present value as of his death, plus interest to date, of Muth's pension rights at his retirement, less the amount already received therefor by Mrs. Muth.

9. Mrs. Muth is not entitled to compensation which Muth might have received as a result of his continuing to serve as president of his union local because the duration of such term of office cannot be determined with a reasonable amount of assurance.

10. The following damages, which must be reduced by 30% (the contribution to Darr's death of his own negligence, have been sustained by claimant Mollie Darr:

a. Darr's lost wages from CBS employment from the date of his death to date, reduced by 25% (which he would have spent on himself), plus

b. the present value of Darr's future lost wages from CBS employment from the present to the date of his retirement, reduced by 25%, plus

c. the present value as of his death, plus interest to date, of $500.00 per year for 21.04 years as compensation for services performed around the house and for parental guidance, plus

d. the present value as of his death, plus interest to date, of Darr's pension rights at his retirement, less the amount already received therefor by Mrs. Darr.

11. Mrs. Muth and Mrs. Darr are entitled to aggregate damages totalling $50,000.00. Mrs. Muth is entitled to that percentage of the $50,000.00 which her damages as described in Conclusions No. 8 reduced by the amount which

she received in exchange for her covenant not to sue bear to the sum of such reduced damages plus Mrs. Darr's damages as described in Conclusion No. 10 reduced by the amount which she received in exchange for her covenant not to sue; Mrs. Darr is entitled to the remainder of the $50,000.00.

Enter:

Hubert L. Will
Judge

APPENDIX 1C.

STATUTES AND REGULATION

1. Statutes

46 U.S.C. §183 (a)

"The liability of the owner of any vessel, • • • for any act, • • • done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not • • • exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." R.S. §4283; Aug. 29, 1935, c. 804, §1, 49 Stat. 960; June 5, 1936, c. 521, §1, 49 Stat. 1474.

46 U.S.C. §187

"Nothing in sections • • • 183 • • • of this title shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers or seamen, for or on account of • • • any negligence • • • of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel." R.S. §4248.

46 U.S.C. §688

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in the case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway em-

ployees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." Mar. 4, 1915, c. 153, §20, 38 Stat. 1185; June 5, 1920, c. 250, §33, 41 Stat. 1007.

45 U.S.C. §51

"Every common carrier by railroad, while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; * * *, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its * * * boats, wharves or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." Apr. 22, 1908, c. 149, §1, 35 Stat. 65; Aug. 11, 1939, c. 685 §1, 53 Stat. 1404.

45 U.S.C. §53

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held

to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." Apr. 22, 1908, c. 149, §3, 35 Stat. 66.

45 U.S.C. §54

"In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statutes enacted for the safety of employees contributed to the injury or death of such employee." Apr. 22, 1908, c. 149, §4, 35 Stat. 66; Aug. 11, 1939, c. 685, §1, 53 Stat. 1404.

2. Regulation

46 C.F.R., §25.25-15 (a)

"The life saving equipment on all vessels shall be so placed as to be readily accessible."